

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Trial Court Presiding Judges Advisory Committee  
Court Executives Advisory Committee  
Kenneth L. Kann, Supervising Attorney  
Mark Jacobson, Attorney, 415-865-7898

DATE: September 17, 2003

SUBJECT: Limitations on Intrabranh Contracting and on Contracting With Former Employees (adopt Cal. Rules of Court, rules 6.103 and 6.104)

Issue Statement

There are no statutes or rules that govern intrabranh contracting and contracting with former employees in the judicial branch. There are existing statutes that address these matters for other branches of state government, but they are not applicable to the judicial branch. In the absence of any such statutes or rules, there is a risk of self-dealing and favoritism, or the appearance of self-dealing and favoritism, in the awarding of contracts within the judicial branch.

Recommendation

The Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee recommend that the Judicial Council, effective January 1, 2004, adopt rules 6.103 and 6.104 of the California Rules of Court. These rules would:

1. Prohibit intrabranh contracting by judicial branch employees; and
2. Prohibit judicial branch entities, for a specified period of time, from contracting with certain former employees who held policymaking positions in the same general subject area as the proposed contract.

Rationale for Recommendation

The proposed rules are designed to prevent self-dealing and favoritism, as well as the public perception of self-dealing or favoritism, in the awarding of contracts within the judicial branch.

### *Rule 6.103—Current employees*

Government Code section 1090 and the Political Reform Act (Gov. Code, § 87100 et seq.) generally prohibit public employees from making or participating in making contracts in which they are financially interested. The prohibitions in these statutes apply to judicial branch employees.<sup>1</sup> The contracting prohibitions of these acts, however, do not apply to an employee who contracts with a public entity other than his or her employer. Thus, these laws may not prohibit an employee of one trial court from contracting with another trial court or with the Administrative Office of the Courts (hereinafter “intrabranch contracting”).

Because the public is likely to perceive all entities of the judicial branch as a single entity, the public could consider intrabranch contracting to be inappropriate. Also, some such contracts might in fact result from self-dealing and favoritism. Proposed rule 6.103 would promote the integrity of contracting by judicial branch entities by prohibiting current employees from engaging in intrabranch contracting unless the activity were required as a condition of the employee’s regular judicial branch employment.

Two prohibitions in Public Contract Code section 10410 provide a useful model:<sup>2</sup>

- No state officer or employee may engage in any employment, activity, or enterprise from which the officer or employee receives compensation or has a financial interest and that is sponsored or funded by any state agency through a contract, unless the employment, activity, or enterprise is required as a condition of regular state employment.
- No officer or employee may, on his or her own behalf as an independent contractor, contract with any state agency to provide goods or services.

This statute does not appear to be applicable to the judicial branch. This conclusion is based on the following: (1) this part of the Public Contract Code is based on predecessor statutes from a portion of the Government Code dealing exclusively with executive branch agencies; (2) substantially similar language for the applicable definition of “state agency” contained in Government Code section 11000 was interpreted in *Millholen v.*

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<sup>1</sup> Government Code section 1090 applies to “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees.” This definition includes employees of the Administrative Office of the Courts, appellate courts, and trial courts. The disqualification provisions of the Political Reform Act apply to “public officials,” a term defined as “every member, officer, employee or consultant of a state or local government agency, [excluding] judges and court commissioners in the judicial branch of government.” (Gov. Code, § 82048.)

<sup>2</sup> Section 10410 states:

No officer or employee in the state civil service or other appointed state official shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, or sponsored and funded, by any state agency or department through or by a state contract unless the employment, activity, or enterprise is required as a condition of the officer’s or employee’s regular state employment. No officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods.

*Riley* (1930) 211 Cal. 29 to not include the judicial branch; and (3) as a matter of policy, it would be inappropriate to apply the Public Contract Code requirements to judicial branch entities.

Proposed rule 6.103 addresses these issues for the judicial branch by prohibiting judicial branch employees from contracting with other judicial branch entities to provide goods or services. The proposed rule is modeled after section 10410. It would eliminate the appearance of bias and the risk of self-dealing by current branch employees.

The rule would contain exemptions for court reporters, part-time commissioners, and part-time court interpreters who are not subject to the cross-assignment system under Government Code section 71810. Court reporters who are employed by courts typically provide transcripts to their courts on a contractual basis. Some commissioners and interpreters may be employed part-time by one court and provide services on a contractual basis to another. There appears to be no strong policy reason to prohibit these practices, which may be of benefit to the courts. The rule would not prohibit any person from being employed by more than one judicial branch entity.

#### *Rule 6.104—Former employees*

Some employees of the Administrative Office of the Courts (AOC), the trial courts, and the appellate courts may be in a position to use their judicial branch employment to create a situation from which they can benefit financially, by contracting to provide consulting or other services, after leaving that employment. Proposed rule 6.104 would prohibit this practice for certain employees for a specified period of time, and would eliminate the appearance of impropriety or conflict of interest. For a trial court, this rule would apply to the court executive officer and any other employees designated by the court.

Public Contract Code section 10411 addresses this type of situation, but it, like Public Contract Code section 10410, does not appear to be applicable to the judicial branch. The statute prohibits any former employee from entering into a contract “in which he or she engaged in any of the negotiations, planning, arrangements, or any part of the decision-making process relevant to the contract” while employed by the state agency. (Pub. Contract Code, § 10411(a).) This prohibition is in effect for two years after the employee is retired, dismissed, or otherwise separated from employment.<sup>3</sup>

The statute also establishes a 12-month moratorium on contracts between any former state officer or employee and his or her former agency, if the official held a policymaking position with the agency in the same general subject area as the proposed contract within

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<sup>3</sup> Section 10411(a) states:

No retired, dismissed, separated, or formerly employed person of any state agency or department employed under the state civil service or otherwise appointed to serve in state government may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by any state agency or department. The prohibition of this subdivision shall apply to a person only during the two-year period beginning on the date the person left state employment.

12 months prior to his or her departure from state government. (Pub. Contract Code, § 10411(b).)<sup>4</sup> The statute expressly exempts contracts for expert witnesses in civil cases and contracts for the continued services of an attorney regarding matters with which the attorney was involved before departing state service.

Section 10411 is a good model for a rule of court pertaining to judicial branch employees. The proposed rule would prohibit any court, for a two-year period, from contracting with a former employee who participated in any way in the process of making the contract while an employee. It would also prohibit, for a one-year period, (1) a court from contracting with its own former employees and former AOC employees who held policymaking positions in the same general subject area, and (2) the AOC from contracting with former AOC employees who held policymaking positions in the same general subject area. The rule would not prohibit courts from contracting with former employees of other courts. It also would not include former judges and justices because they are not employees of the courts.

The rule would not prohibit employment of any former employees by the courts or the AOC. Under most county retirement systems in California, former employees may be employed as retired annuitants for up to 960 hours, or 24 weeks per year, without incurring any penalty. In some counties, the limit beyond which a penalty attaches is 720 hours, or 18 weeks.

This rule prohibiting contracting with, and permitting employment of, certain former employees would protect courts and the AOC from possible pressure to pay exorbitant consulting fees, while allowing the opportunity to use the services of retired employees under the court's prescribed employment policies. In addition, the courts and the AOC would not be subject to the limitations of an independent contractor relationship and would have greater control over the work of the persons hired.

Public Contract Code section 10411 does not contain any definition of the term "policymaking position." This term is not defined in any case law, and no analogous authority has been identified that is helpful in defining the term. Therefore, the proposed rule defines the term as including specified executive-level positions, and also allows each court and the AOC to identify additional positions to which the prohibition would apply. As already noted, for trial courts the rule applies only to court executive officers and any other employees designated by the courts. Because the purpose of the rule is to prohibit contracts with persons whose positions at the court or agency would allow them

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<sup>4</sup> Section 10411(b) states:

For a period of 12 months following the date of his or her retirement, dismissal, or separation from state service, no person employed under state civil service or otherwise appointed to serve in state government may enter into a contract with any state agency, if he or she was employed by that state agency in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement, dismissal, or separation. The prohibition of this subdivision shall not apply to a contract requiring the person's services as an expert witness in a civil case or to a contract for the continuation of an attorney's services on a matter he or she was involved with prior to leaving state service.

to establish policies that could benefit them after employment, it specifies court executive officers. However, because the classifications and duties of positions vary from court to court, the rule cannot designate all the positions that have policymaking authority. Thus, the rule allows the courts the flexibility to designate positions as appropriate for their particular circumstances.

#### Alternative Actions Considered

Some members of the Court Executives Advisory Committee suggested including in the rule concerning former employees a good faith exception that would allow courts and the AOC to contract with former policymaking employees in special circumstances. This suggestion was rejected because the exception could encompass so many situations that it might nullify the rule. The rule does not prohibit the courts or the AOC from re-employing former employees, thereby providing considerable flexibility for the continued use of their services.

#### Comments From Interested Parties

There were 12 responses to the invitation to comment. Four commentators supported both proposed rules without comment, one supported both proposals and made a substantive comment about proposed rule 6.103, two indicated that they would support the proposals only if amended, one stated that she supported proposed rule 6.103 and would support proposed rule 6.104 only if amended, one indicated that she would support proposed rule 6.104 only if amended, two stated that they supported proposed rule 6.103 but opposed rule 6.104, and one opposed proposed rule 6.104 without offering any comment on proposed rule 6.103.

#### *Proposed rule 6.103*

One commentator who supported the proposed rules stated that it would be helpful to clarify the distinction in rule 6.103 between “contract” and “employed.” These terms are sufficiently clear in the employment context, and there is no need to define them.

Two commentators suggested that rule 6.103 be amended to clarify that it is not intended to prohibit an employee from volunteering to provide goods and services. The rule is intended to apply only to situations in which there is monetary compensation or a contract provides the volunteer with another type of financial interest. To clarify this situation, the term “contract” has been changed to “contract to provide goods or services for which compensation is paid.”

One commentator also stated that the Political Reform Act (PRA) (Gov. Code, § 87103) arguably covers the subject of proposed rule 6.103. Under the PRA, however, public officials are disqualified from participating in government decisions in which they have a financial interest. The focus is on a particular decision by a public official who has a financial interest. Unlike the PRA, the proposed rules do not focus on a particular decision but rather preclude the existence of a contracting relationship. They are designed to prevent situations that could lead to a conflict for a judicial branch employee. These rules also would prevent the *appearance* of impropriety, regardless of whether

there were an actual conflict. In addition, the PRA does not address situations involving employees contracting with public entities other than their employers.

One commentator recommends incorporating the PRA's definitions of "financial interest" and "independent contractor" into the rule. Another commentator requested clarification of the term "independent contractor" and suggested using the Internal Revenue Service guidelines. It is unnecessary to define these terms because "financial interest" is intended to be broad, and "independent contractor" is used in the usual sense to refer to someone contracting with a judicial branch entity—as distinct from being employed by the entity, and as construed under well-established California case law.

One commentator was concerned about pro tem court reporters and contract interpreters receiving double per diems from the trial courts as a result of multiple employment. This concern is beyond the scope of proposed rule 6.103.

Finally, one commentator suggested that the language in rule 6.103(c)(1) prohibiting a judicial branch employee from engaging in "any employment, enterprise, or other activity" conflicted with subdivision (d), which states that the rule does not prohibit any person from being employed by more than one judicial branch entity. She proposed changing the term "employment" to "consulting." However, subdivision (c)(1)(B) makes it clear that the prohibited "employment" must be sponsored or funded "through or by a contract." Thus, the modification is not necessary.

#### *Proposed rule 6.104*

Three commentators opposed proposed rule 6.104. Two are court executive officers; the other is the contracts manager at the Superior Court of Los Angeles County, who submitted comments on behalf of herself and the court counsel. One of the court executive officers and the contracts manager stated that courts should have the flexibility to contract for the consulting services of former employees in technical areas or in contract management, and that it was unclear whether the rule would permit such flexibility. The rule would prohibit such contracting, but only if the former employee held a "policymaking position." In the trial courts, the prohibition applies only to court executive officers and others designated by the court. Allowing the courts to designate the positions to which the rule applies would provide substantial flexibility.

The other court executive officer who opposed the rule stated that the rule would hinder or limit the court's access to a specialized knowledge base. She added that the courts have benefited from contracting with former court executive officers and AOC employees who have the knowledge and expertise required to assist the courts with special projects. Under the proposed rule, the courts would retain flexibility through the option of re-employing former employees for such purposes.

This commentator and one other commentator stated that it was unclear whether the courts could contract with a company that employs a former judicial branch employee, rather than contract directly with the former employee. The proposed rule only prohibits

contracting with “a person previously employed.” If conflicts problems emerge concerning contracting with entities that employ former employees, an amendment to the rule could be considered.

One commentator questioned why judges and justices are excluded from the scope of proposed rule 6.104. The rule would not apply to judges and justices because they are not employees and they typically are not involved in the types of administrative functions the rule is intended to address.

One commentator suggested that the term “contract” be expanded to “contract for goods and services for which consideration is provided” to distinguish it from other post-employment settlements or agreements that may be entered into that are not related to the provision of goods and services—e.g., settlement after a contested dismissal termination. Proposed rule 6.104 was modified as suggested, substituting the word “compensation” for “consideration.”

Some members of the Court Executives Advisory Committee had previously questioned whether the rule should more clearly define the term “policymaking position” in order to avoid inconsistent practices among the trial courts. One commentator also raised this issue. Because the courts throughout the state are structured so differently, leaving the term undefined will afford the courts the flexibility they need to apply the rule to varying local circumstances.

#### Implementation Requirements and Costs

Implementation of these rules would result in no costs. Judicial branch entities might benefit financially from proposed rule 6.104 because they might avoid payment of exorbitant consulting fees.

Rules 6.103 and 6.104 of the California Rules of Court would be adopted effective January 1, 2004, to read:

**Rule 6.103. Limitation on intrabranh contracting**

**(a) [Definitions]** For purposes of this rule, “judicial branch entity” includes a trial court, a Court of Appeal, the Supreme Court, and the Administrative Office of the Courts.

**(b) [Application]** This rule does not apply to:

(1) Part-time commissioners, with respect to services as a commissioner;

(2) Part-time court interpreters who are not subject to the cross-assignment system under Government Code section 71810, with respect to interpreter services provided to a court; and

(3) Court reporters, with respect to reporter services provided to a court.

**(c) [Intrabranh limitations]** An employee of a judicial branch entity must not:

(1) Engage in any employment, enterprise, or other activity

(A) from which he or she receives compensation or in which he or she has a financial interest, and

(B) that is sponsored or funded by any judicial branch entity through or by a contract for goods or services for which compensation is paid, unless the activity is required as a condition of his or her regular judicial branch employment; or

(2) Contract with any judicial branch entity, on his or her own behalf, to provide goods or services for which compensation is paid.

**(d) [Multiple employment]** This rule does not prohibit any person from being employed by more than one judicial branch entity.



1 **Rule 6.104. Limitation on contracting with former employees**

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3 **(a) [Trial and appellate court contracts with former employees]** A trial  
4 or appellate court may not enter into a contract for goods or services for  
5 which compensation is paid with a person previously employed by that  
6 court or by the Administrative Office of the Courts:  
7

8 (1) For a period of 12 months following the date of the former  
9 employee's retirement, dismissal, or separation from service, if he  
10 or she was employed in a policymaking position in the same  
11 general subject area as the proposed contract within the 12-month  
12 period before his or her retirement, dismissal, or separation; or  
13

14 (2) For a period of 24 months following the date of the former  
15 employee's retirement, dismissal, or separation from service, if he  
16 or she engaged in any of the negotiations, transactions, planning,  
17 arrangements, or any part of the decision-making process relevant  
18 to the contract while employed in any capacity by the court or the  
19 Administrative Office of the Courts.  
20

21 **(b) [Administrative Office of the Courts contracts with former**  
22 **employees]** The Administrative Office of the Courts may not enter into  
23 a contract for goods or services for which compensation is paid with a  
24 person previously employed by it:  
25

26 (1) For a period of 12 months following the date of the employee's  
27 retirement, dismissal, or separation from service, if he or she was  
28 employed in a policymaking position at the Administrative Office  
29 of the Courts in the same general subject area as the proposed  
30 contract within the 12-month period before his or her retirement,  
31 dismissal, or separation.  
32

33 (2) For a period of 24 months following the date of the former  
34 employee's retirement, dismissal, or separation from service, if he  
35 or she engaged in any of the negotiations, transactions, planning,  
36 arrangements, or any part of the decision-making process relevant  
37 to the contract while employed in any capacity by the  
38 Administrative Office of the Courts.  
39

1 (c) [Policymaking position] “Policymaking position” includes:  
2

3 (1) In a trial court, the court’s executive officer and any other position  
4 designated by the court as a policymaking position;  
5

6 (2) In an appellate court, the clerk/administrator and any other position  
7 designated by the court as a policymaking position; and  
8

9 (3) In the Administrative Office of the Courts, the Administrative  
10 Director of the Courts, the Chief Deputy Director, any director,  
11 and any other position designated by the Administrative Director  
12 as a policymaking position.  
13

14 (d) [Scope] This rule does not prohibit any court or the Administrative  
15 Office of the Courts from (1) employing any person or (2) contracting  
16 with any former judge or justice.  
17

**SPR03-53**

**Contracting: Limitations on Intrabranch Contracting and on Contracting With Former Employees**  
(adopt Cal. Rules of Court, rules 6.103 and 6.104)

|    | <b>Commentator</b>  | <b>Position</b> | <b>Comment on behalf of group?</b> | <b>Comment</b>  | <b>Proposed Committee Response</b>   |
|----|---|-----------------|------------------------------------|---|--|
| 1. | Ms. Linda Finn<br>Deputy Executive Officer<br>Superior Court of Ventura County      | A               | N                                  | No comment.   | No response necessary.   |
| 2. | Mr. Robert Gerard<br>President<br>Orange County Bar Association                     | A               | Y                                  | No comment.   | No response necessary.   |
| 3. | Mr. Stephen V. Love<br>Executive Officer<br>Superior Court of San Diego County      | N               | N                                  | Proposed rule 6.104 is poorly worded. The court's research attorneys and HR managers cannot understand what is and what is not permissible. Sufficient flexibility should be present for legitimate consulting services of former employees in technical areas, or companies utilizing the services of former employees who were not involved in awarding a contract. As drafted, we cannot determine if this flexibility is present. | The rule affords flexibility to the courts by continuing to allow them to reemploy former employees. Additionally, the rule applies only to policymaking positions, which, for the trial court, means court executive officers and any other position designated by each particular court. Allowing the court to designate which positions are "policymaking" also provides flexibility. The rule does not address the issue of a court contracting with a company that employs a former judicial branch employee, and such contracting is not prohibited by the rule. This issue can be addressed in the future if it is a problem. |
| 4. | Mr. Thomas A. Pistone   | A               | N                                  | No comment.   | No response necessary.   |
| 5. | Ms. Elena Simonian<br>Court Administrator<br>Superior Court of San Francisco County | A               | N                                  | In proposed rule 6.103, it would help to clarify the distinction between "contract" and "employed." For example, we have a 40 hours-per-week employee whom the AOC wants to hire (contract) for some  | The proposed rule would prohibit an employee of the court from contracting with the AOC while employed by the court. The terms "contract" and "employed" are used  |

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|----|--|-----------------|------------------------------------|---|--|
|    |  |                 |                                    | after-hours work. I would interpret these proposed rules as prohibiting this. Am I correct?   | in the traditional sense in that a person is “employed” if that person is an employee, as distinct from an independent contractor.   |
| 6. | Mr. Ty Tasker<br>Research Attorney<br>Superior Court of Los Angeles County | AM              | N                                  | <p>In proposed rule 6.103, to avoid a potentially chilling effect on employees generously agreeing to volunteer to work for other judicial branches, the proposed rule could be amended to further clarify that the rule is not intended to prohibit an employee from volunteering to provide goods and services.</p> <p>The Political Reform Act (Gov. Code, § 87103 et seq.) arguably already sufficiently covers the subject of the proposed rule.</p> <p>Similarly, the definitions of terms derived from that act might help set out more guiding definitions of the terms used in the proposed rule, such as the meanings of “financial interest” and “independent contractor.”</p> | <p>Proposed rule 6.103 applies only in situations in which there is monetary compensation or in which a volunteer has a contract under which he or she receives some other type of financial reward. To address this situation, the phrase “for goods or services for which compensation is provided” has been added after the word “contract” in proposed rule 6.103(c)(1)(B) and (c)(2).</p> <p>The Political Reform Act prohibits public officials from participating in government decisions in which they have a financial interest. These proposed rules are designed to avoid situations in which a judicial branch employee could face a conflict in the future. They also prevent the appearance of impropriety even if there is no actual conflict.</p> <p>The term “financial interest” is intended to be broad. The term “independent contractor” is used in the usual sense to refer to someone who is contracting with a judicial branch entity as distinct from being</p> |

**SPR03-53**

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|----|---|-----------------|------------------------------------|---|--|
|    |   |                 |                                    |   | employed by the entity, and as construed under well-established California case law.   |
| 7. | Ms. Kiri Torre<br>Executive Officer<br>Superior Court of Santa Clara County | AM              | N                                  | <p>Under proposed rule 6.103, multiple employment should not result in the employee receiving a double per diem. Pro tem reporters and contract interpreters should not be allowed to receive double per diems from the trial courts in the same half/full-day time period.</p> <p>In proposed rule 6.103, there is a need for a provision to address volunteering to provide goods and services. Given the dire budget situation, many courts are or will be relying more heavily on volunteers to assist with projects and activities. There is also a related issue regarding state liability coverage for any actions taken by volunteers that may result in claims or litigation filed against the court or the AOC.</p> <p>In proposed rule 6.103, there is a need for clarification of the term “independent contractor,” perhaps using the IRS guidelines for determining independent contractor status.</p> <p>Proposed rule 6.103(c) prohibits an employee from engaging in any other “employment.” This appears to be in conflict with subsection (d), which indicates that one can be employed by more than one judicial branch</p> | <p>This concern is beyond the scope of the proposed rule.</p> <p>Proposed rule 6.103 applies only in situations in which there is monetary compensation or in which a volunteer has a contract under which he or she receives some other type of financial reward. To address this situation, the phrase “for goods or services for which compensation is provided” has been added after the word “contract” in proposed rule 6.103(c)(1)(B) and (c)(2).</p> <p>The term “independent contractor” is used in the usual sense to refer to someone who is contracting with a judicial branch entity as distinct from being employed by the entity, and as construed under well-established California case law.</p> <p>Subsection (c)(1)(B) makes it clear that only employment that is funded through or by a contract is prohibited.</p> |

**SPR03-53**

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|    |   |  |                                    | <p>entity. I would suggest changing “employment” in rule 6.103(c)(1) to “consulting.”</p> <p>In proposed rule 6.104, there is a need for a provision that addresses the conflict situation in which a court contracts with a company that employs a former judicial branch employee. Given the business relationships that court executives and other executive management personnel in the courts and the AOC form with outside vendors and companies, this is a very important area to address now, not later.</p> <p>In proposed rule 6.104, why does the proposed rule allow an exception for any court or the AOC to contract with a former judge or justice, who by their positions were in policymaking roles?</p> | <p>The rule does not address the issue of a court contracting with a company that employs a former judicial branch employee, and such contracting is not prohibited by the rule. This issue can be addressed in the future if it is a problem.</p> <p>The proposed rule addresses contracting with former employees who are administrators, and justices and judges are not employees. In addition, justices and judges typically are not involved in the types of administrative functions this rule is intended to address.</p> |
| 8. | Tina Burkhart<br>Executive Officer<br>Superior Court of Glenn<br>County | <p>AM<br/>(6.103)</p> <p>N<br/>(6.104)</p> | N                                  | <p>On proposed rule 6.103, I would agree with the rule, with Kiri Torre’s suggested modifications.</p> <p>On proposed rule 6.104, I agree with Kiri Torre’s suggested modifications, but even with those, I oppose the rule. Overall, I think the rule relating to contracting with former court employees hinders or limits the court’s access to a specialized knowledge</p>  | <p>See responses to Kiri Torre’s comments.</p> <p>The rule affords flexibility to the courts by continuing to allow them to reemploy former employees. The rule applies only to policymaking positions, which, for the trial court, means court executive officers and</p>  |

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|     |   |                 |                                    | base. It has been extremely beneficial to contract (usually via grants) with former CEOs and AOC employees who have the knowledge and expertise required to assist the courts with special projects or when experienced assistance is needed at an administrative level.  | any other position designated by the court.   |
| 9.  | Denise Gordon<br>Executive Officer<br>Superior Court of Sonoma County | AM              | N                                  | <p>In proposed rule 6.104, we need further direction on or understanding of the court's capability of contracting with companies that employ former judicial branch policymaking employees, especially if there is an expectation that many will retire in the next few years. One way to do this would be to permit the contract with the company as long as the former employee is not assigned to the project if the contract is with his/her former court. (This would be a one-year restriction similar to the single contract policy.)</p> <p>I also think we need stronger language with respect to court-designated policymakers. Can the courts designate and un-designate periodically? Would designees be reported to the AOC or kept local? And who is responsible for the designation—the executive officer, the executive committee? While flexibility among courts is necessary, some standards should also be applied so as not to have one court be tougher in its designation, penalizing a technically competent employee, while another court interprets more generically, permitting a contractual relationship. As the proposed rule exists, it is not clear.</p> | <p>The rule does not address the issue of a court contracting with a company that employs a former judicial branch employee, and such contracting is not prohibited by the rule. This issue can be addressed in the future if it is a problem.</p> <p>Because the courts throughout the state are structured so differently, the courts require flexibility to make local determinations of what constitutes a “policymaking position.”</p> |
| 10. | Tania G. Ugrin-Capobianco   | A               | N                                  | No comment.   | No response necessary.  |

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|-----|---|----------------------------------|------------------------------------|--|--|
|     | Executive Officer<br>Superior Court of Mendocino<br>County                      |                                  |                                    |  |  |
| 11. | Mary Beth Todd<br>Executive Officer<br>Superior Court of Calaveras<br>County    | A<br>(6.103)<br>AM<br>(6.104)    | N                                  | <p>I would recommend approval of proposed rule 6.103.</p> <p>I would recommend approval of proposed rule 6.104 with the modification that the term “contract” be expanded to “contract for goods and services for which consideration is provided” or similar language to distinguish it from other post-employment settlements or agreements that may be entered into that are not related to the provision of goods and services (e.g., settlement after a contested dismissal termination).</p>   | <p>No response necessary.</p> <p>Agreed. Proposed rule 6.104 has been modified as suggested, substituting the word “compensation” for “comsideration.”</p>   |
| 12. | Evelyn Vergne, Manager,<br>Contracts<br>Superior Court of Los<br>Angeles County | A<br>(6.103)<br><br>N<br>(6.104) | N                                  | <p>Both Brett Bianco, Court Counsel, and I believe that proposed rule 6.103 is an appropriate limitation on employees to avoid preferential treatment or a conflict of interest.</p> <p>However, we have an issue with regard to rule 6.104. It appears that rule 6.104 would tie our hands. We could have a situation in which, due to budgetary reasons, the court is forced to lay off the contract services manager (me). Shortly thereafter, the court determines that they need someone to do consulting work on managing existing contracts. I am the most familiar with the court’s contracts, I am in the best position to do what needs to be done, and the court would like to engage my services as an independent contractor. Under this hypothetical, rule 6.104</p> | <p>No response necessary.</p> <p>The rule affords flexibility to the courts by continuing to allow them to re-employ former employees. Additionally, the rule applies only to policymaking positions, which, for the trial court, means court executive officers and any other position designated by the court.</p> |



**SPR03-53**

**Contracting: Limitations on Intrabranh Contracting and on Contracting With Former Employees**  
(adopt Cal. Rules of Court, rules 6.103 and 6.104)

|  | <b>Commentator</b> | <b>Position</b> | <b>Comment on behalf of group?</b> | <b>Comment</b>   | <b>Proposed Committee Response</b>  |
|--|--------------------|-----------------|------------------------------------|--|---|
|  |                    |                 |                                    | <p>prohibits me from doing the work. The court would be forced to find someone less experienced, less qualified, and less familiar with the existing contracts. In the absence of rule 6.104, there would be sufficient justification to “sole-source” a contract with me to perform these services. With rule 6.104 in place, the court’s hands are tied.</p> <p>In the report, there is a statement that rule 6.104 would not prohibit employment of any former employees by the courts or the AOC. However, that language is not included in the actual rule.</p> <p>Furthermore, if the court has authority to “hire” a former employee as opposed to entering into a contract with the former employee, it seems that this would be a way for the courts to circumvent rule 6.104. Therefore, our initial recommendation is that rule 6.104, as written, is not necessary and is counterproductive.</p> | <p>Proposed rule 6.104(d) states that the rule does not prohibit any court or the AOC from employing any person.</p> <p>The rule is designed to deter situations in which employees could use their judicial branch employment to create a circumstance from which they could benefit financially after leaving that employment, by contracting to provide consulting or other services. The rule would protect courts and the AOC from possible pressure to pay exorbitant consulting fees. The rule also is designed to avoid the appearance of conflicts of interest. In addition, the court or the AOC would not be subject to the limitations of an independent contractor relationship and would have greater control over the work of the person as an employee.</p> |